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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 521

REBECCA SIMON WOLFSOHN, Executrix for the Estate of Joel David Wolfsohn, Deceased,
Petitioner,

v.

GREGORY HANKIN and PROFESSIONAL INVESTMENT MANAGEMENT COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT HANKIN IN OPPOSITION

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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To the Honorable,

The Supreme Court of the United States:

The Petition for Writ of Certiorari, which by its terms incorporates the Petition for Writ of Mandamus filed simultaneously therewith, fails to comply with Rules 19, 21, 23 and 40(5) of the Rules of this Court. It

should therefore be denied, or dismissed, or disregarded and stricken from the files of this Court. Respondent further submits that the case calls for award of damages to Respondent under Rule 56(4) of the Rules of this Court, and under the general equity powers of this court.

I. REASONS FOR DENIAL OF PETITION.

The Petition should be denied, because (A) it does not comply with Rule 23, (B) it fails to comply with Rule 19, (C) no error was committed by the Court below and (D) the constitutional questions raised are without substance.

A. Failure to Comply with Rule 23.

The Petition fails to comply with Rule 23 in the following particulars:

1. The "questions presented" (Mand. pp. 4-5 and Pet. pp. 2-3) do not conform to Rule 23(1)(c). Each of the questions stated is a double or multiple question based on assumptions contrary to fact, is for most part unintelligible, and is not susceptible to a categorical answer. The real questions presented by this case may be stated as follows:

> (a) Did the judgment and mandate of this Court in *Wolfsohn* v. *Hankin*, 376 U.S. 203, reversing the holding of the Court below that the appeal therein had not been timely filed and remanding the case for further proceedings, necessarily imply that the Court of Appeals must render judgment on the merits in favor of Appellant (Petitioner herein)?
>
> (b) When the case had already been briefed and argued on the merits in the Court below before reversal by the Supreme Court on the procedural question, was the Court below required upon remand to call for additional briefs and again hear oral argument, especially if Appellant filed a Motion for Sum-

mary Reversal and Appellee agreed that there was no need for additional briefs or oral argument?

(c) Did the Court below err in affirming the judgment of the District Court which granted summary judgment in favor of the defendants (Respondents herein)?

2. There is no concise "Statement of the Case" containing the facts material to a consideration of the questions presented, as required by Rule 23(1)(e). While Petitioner's "Statement of the Case" (Pet. p. 4) is short, it does not state sufficient facts for the consideration of the questions presented. A sufficient statement of the case is set forth herein (pp. 4-8 infra) in connection with the showing that there was no departure by the Court below from the accepted and usual course of judicial proceedings.

3. The Petition does not contain "direct and concise argument amplifying the reasons relied on for the allowance of the writ", as required by Rule 23(1)(h). Indeed, Petitioner's argument seems to be that the judgment below should be reversed, because Respondent Hankin is an unworthy character, as was more fully discussed in Respondent's Opposition to the Motion for Leave to File a Petition for Writ of Mandamus (pp. 12-15, therein), and because Petitioner thinks that the Court below wilfully refused to comply with the mandate of the Supreme Court and violated Petitioner's constitutional rights, all of which will be shown to be without substance (pp. 7, 15 infra).

4. The Petition fails "to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration", as is required by Rule 23(4).

B. There Was No Departure from the Accepted and Usual Course of Judicial Proceeding.

Petitioner's ground for seeking a writ of certiorari is, in the words of Rule 19(1)(b), that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceeding, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision" (Pet. p. 9). No such departure is shown in Petitioner's "Statement of the Case" (Pet. p. 4) which is limited to the proceeding in the Court below on remand. The facts stated hinge upon Petitioner's notion that "in exact conformity with the ruling of this Court" Petitioner filed a Motion for Summary Reversal, and the Motion was denied. There certainly was nothing unusual about that.

Since this Court is entitled to know what the case is about, and it is difficult to gain this knowledge from the petition or from the record filed herewith (See pp. 16-19 infra), Respondent will set forth herein this Counterstatement of the Case:

1. *Proceedings in the District Court.*—(a) Petitioner, Plaintiff below, brought action against Professional Investment Management Co. (PIMCO) to recover damages for an alleged breach of contract of employment of Plaintiff's decedent, Joel D. Wolfsohn, as Secretary of the defendant corporation. Respondent Hankin, who at the time was President of PIMCO, was joined as a party defendant in this part of the complaint.[1] (R. 5). The complaint alleged, that Plaintiff's decedent was forced out of his office, and was compelled to submit his resignation, before the expiration of his contract term, and

[1] The action against PIMCO also included a claim of $3967 for serevices rendered and a claim of $4050 to recover Mr. Wolfsohn's alleged investment in PIMCO common stock. With these claims, Respondent Hankin has no concern. Joined as defendant, also, was Consumers Investment Fund (CIF), but was later dismissed by the Plaintiff.

that therefore Plaintiff, as his personal representative, was entitled to his salary for the remainder of said term, to wit: $10,000. Attached to the complaint, as Exhibits thereto, were a copy of the contract, an affidavit by the Plaintiff and the second page of decedent's memorandum of resignation which he had read to the PIMCO Board of Directors at their meeting of January 19, 1959 (R. 3-11, 48).

(b) Each of the defendants filed an answer, which included a Motion to Dismiss and for Summary Judgment. Defendant Hankin defended that the action against him was frivolous, since he was not a party to the contract on which the action was brought; also, treating the action against him as one in tort, that such right of action did not survive the decedent (R. 13).

In addition, he adopted all of PIMCO's defenses; namely, that (i) the complaint was defective in that it did not allege that the decedent performed and was ready, willing and able to perform his part of the contract; (ii) the facts showed that he did not comply, nor was he ready, willing and able to comply with his part of the agreement; (iii) there was no breach of contract, since the decedent resigned voluntarily and (iv) the claims asserted by the Plaintiff belonged to the firm of Chapman, Wolfsohn & Friedman and had been settled by the surviving partners. PIMCO's answer was supported by an affidavit by Gregory Hankin, which in turn was supported by a number of Exhibits (R. 19, 84-106).

(c) Plaintiff opposed the Motion for Summary Judgment (R. 22) and filed her own Motion for Judgment on the Pleadings and for Summary Judgment. The latter was supported by an affidavit of Mr. Simon and by a document entitled "Statement of Material Facts in Support of the Motion for Summary Judgment" (R. 24-31).

(d) On March 8, 1962, these Motions were argued orally before District Judge Curran, who took the matter under advisement, and on May 7, 1962, rendered an Order denying Plaintiff's Motion and granting Defendants' motion for Summary Judgment (R. 109).

(e) On June 11, 1962, Plaintiff filed a Motion to Reconsider, claiming "newly discovered evidence", and also demanded a jury trial (R. 32-9). This was followed by several other Motions which were before the District Judge when he considered the Motion for Reconsideration. On October 12, 1962, the District Court denied that Motion and the Jury Demand. (R. 52) Plaintiff appealed from that Order (not from the Order of May 7, 1962) to the U.S. Court of Appeals for the District of Columbia Circuit (R. 52).

2. *Proceedings in the Court of Appeals.* (a) Even before the record was filed in the Court of Appeals, Appellant filed a Motion for Summary Reversal, claiming that the decision of the District Court was "prompted by dissimulation," rather than by rules of law (R. 185). This Motion was denied (R. 266).

(b) After much delay, occasioned by other Motions and Oppositions thereto, briefs were filed on the merits, and on May 13, 1963, oral arguments were heard by the Court of Appeals. Some of the questions asked from the Bench related to the timeliness of the appeal.

(c) On May 29, 1963, the Court of Appeals rendered its opinion and judgment (321 F. 2d 393). It held that the Motion for Reconsideration, having been filed more than 30 days after the Order of May 7, 1962, did not toll the period within which an appeal could be taken from that Order, and dismissed the appeal. However, treating the appeal as having been taken from the Order of October 12, 1962, denying reconsideration, the Court below stated: ". . . we still affirm the disposition of the District Court".

3. *Proceedings on the First Petition for Certiorari.*— Petitioner filed a petition for writ of certiorari (No. 680, October Term, 1963). On February 24, 1964, this Court granted the writ and, at the same time, in a per curiam 5 to 4 opinion (376 U.S. 203), reversed the judgment of the Court below on the authority of *Harris Truck Lines* v. *Cherry Meat Packers*, 371 U.S. 215, and *Thompson* v. *Immigration and Naturalization Service*, 375 U.S. 384, thus holding that the appeal had been timely taken. The cause was remanded for further proceedings in conformity with this Court's opinion.

4. *Proceedings Below Upon Remand.* Upon remand, Appellant filed a Motion for Summary Reversal (R. 304), which necessarily implied submission of the case without additional briefs or oral argument. Appellee Hankin opposed reversal of the judgment of the District Court, but agreed with Appellant that there was no need for additional briefs or oral argument, since the merits had already been briefed and orally argued (R. 409). Appellant filed a Reply (R. 312), which did not oppose summary disposition of the case. To the contrary, it insisted: *"This litigation should now be ended"* (R. 313). (Emphasis supplied).

On May 6, 1964, the Court of Appeals (through Judges Edgerton, Wright and McGowan) issued an Order (R. 316) which recited the action of this Court and Appellant's Motion for Summary Reversal, as also the fact that the case has been considered on the merits and had been argued by counsel. The Court then recalled and vacated its previous judgment and opinion, denied Appellee's Motion for Summary Reversal and affirmed the judgment of the District Court.

Appellant filed a Motion for Reconsideration and for a hearing by *another* Panel, or by the Court en banc (R. 317). Respondent opposed (R. 418), and the Motion

was denied by both the Panel and the entire Court (R. 325, 326).

It is clear from the above that there was no departure from the accepted and usual course of judicial proceedings, either by the Court of Appeals or by the District Court. The proceedings upon remand were quite in accord with proceedings in this Court in cases where judgments are at times affirmed or reversed without superfluous briefs or arguments.

C. The Court Below Committed no Error.

This Court does not grant certiorari merely to correct errors in decisions of the lower courts. Apart from the exercise of its power of supervision, it exercises its jurisdiction on certiorari only in cases of public importance or to promote certainty and uniformity in the law. The case at bar does not come within any such category. Nevertheless, it will be demonstrated that there is no merit in the Petition, because the decision of the Court below was correct. Since the Court of Appeals affirmed the judgment of the District Court without an opinion, it becomes necessary to show that the decision of the District Court was also correct.

The procedural steps having already been set forth (pp. 4-8 supra), Respondent will avoid repetition by treating the substance of the pleadings, issues and evidence analytically rather than chronologically.

1. *The Parties.*—(a) At the outset, Hankin's defense was that the action against him was frivolous, because he was not a party to the contract and had not undertaken any obligations thereunder; in other words, he was not a proper party defendant (R. 13).

(b) He further defended that, treating the action against him as one in tort, such right of action did not survive the decedent; in other words, on this theory of

the case, the Executrix was not a proper party plaintiff. Plaintiff's counsel rejected this suggestion insisting that this was "*a suit upon a contract*" (R. 26).

2. *Performance by Plaintiff's Decedent.*—(a) The contract in question permitted the Secretary to engage in other employment (e.g. as a member of the law firm of Chapman, Wolfsohn & Friedman), but it provided, in paragraph 3 thereof, that such other employment shall not conflict or interfere with the performance of his duties as Secretary (R. 7). Since the action brought was to recover compensation for future services, the defense was that the complaint was insufficient in law, in that it failed to allege that the decedent had performed and was ready, willing and able to perform his part of the agreement (R. 84-5).

(b) True, in his Memorandum of Resignation (R. 48), plaintiff's decedent had stated: "The drafting of minutes of meetings, notices and the like has been done . . . by my office". But this fell far short of a statement that he performed and was ready willing and able to perform all the duties of Secretary of the corporation. In his affidavit, defendant Hankin showed (R. 90-1) that Mr. Wolfsohn's duties in his law office so interfered with the performance of his duties as Secretary, especially "such other duties as shall be assigned to him by the President or the Board of Directors", as provided in the By-Laws (R. 100), that the defendant repeatedly called upon him to perform, and that it finally became necessary to call a meeting of the Executive Committee of the PIMCO Board to define specifically all the duties of the Secretary (R. 101-2). In other words, not only was there no allegation in the complaint that the decedent performed and was ready, willing and able to perform the covenants and agreements undertaken by him to be performed, but the facts showed that the decedent did not perform, and there was no likelihood that he would perform, his part of the contract.

3. *Alleged Breach of Contract*—The alleged breach of contract was spun out in a number of steps, each of which was denied through uncontradicted documentary evidence.

(a) First, *that under PIMCO By-laws only Board members could hold office* (R. 4). This was taken from decedent's memorandum of resignation which stated that the President had "pointed out that under the By-laws only Board members may hold office" (R. 48). Yet, Mr. Wolfsohn was a member of the Bar, he had participated in drafting the By-Laws, he knew the contents thereof, and he did not have to rely on what the President had allegedly "pointed out".

Defendant denied that there was such a provision in the By-Laws and introduced the By-Laws themselves (R. 92-99), which showed no such requirement relating to the Secretary, but only to the President and the First Vice President.

(b) Second, *that Hankin withheld decedent's reelection to the Board.* (R. 4) Decedent's Memorandum of Resignation stated that the President had "announced that he would not recommend" decedent's reelection (R. 48). Quite a difference! The defense was that, under the By-laws the President *could not* withhold decedent's reelection, since directors were elected by the stockholders (R. 86, 92, 98); also that Hankin *did not* withhold decedent's reelection, since he joined the other members of the Board in renominating decedent for a full five year term (R. 103).

(c) Third, *that decedent's contract was thus made a "nullity and impossible to perform"*. The defense was that under the By-laws failure of reelection to the Board did not terminate the contract even of the President and First Vice President (R. 92) furthermore, only the Board could remove him from office (R. 99), and no such thing was either threatened or done by the Board.

Fourth, *that the decedent resigned involuntarily.* So the decedent stated in his Memorandum! The minutes of the meeting of January 19, 1959, however, show (R. 103), that upon being renominated, the decedent was asked to withdraw his resignation, and the latter stated that he "would have to consider the matter". The minutes also show that "It was then agreed that if the resignation was withdrawn, the slate would be presented by the management. If it was not withdrawn, then a special meeting of the Board would be called to consider the situation".

All this points to the fact that, far from being removed from office, the decedent was asked not to resign, but that he chose to do so. The evidence further showed (R. 93-4) that no special meeting of the Board was called, because the decedent did not announce his final decision to resign until the stockholders meeting on March 9, 1959, despite repeated requests that he should not resign. As late as March 10, 1959, he acted as Secretary of the corporation (R. 94). It is also significant that Mr. Wolfsohn made no further reference to his Memorandum and never made it a part of the corporate records (R. 93).

This is the backbone of Petitioner's case, and Petitioner's counsel relied on *Paroczay* v. *Hodges*, 297 F. 2d 439 (R. 347). But the facts there were entirely different. There, the plaintiff, a Government employee, was called in by his personnel officer and told to resign "right now", otherwise proceedings for his dismissal would be instituted immediately. The employee was given no opportunity to confer with counsel or with his family or friends. He brought action for reinstatement. The defendant denied the allegations, and the District Court granted summary judgment in favor of the defendant. The Court of Appeals reversed, holding that there was a genuine issue of fact as to whether the resignation was voluntary.

The Court distinguished the *Paroczay* case from *Rich* v. *Mitchell*, 263 F. 2d 78, cert. den. 368 U.S. 854, where an employee under similar circumstances was required to resign, but was given "three days" in which to consider his course of action, and the resignation was held voluntary.

In the case at bar, the decedent was not required to resign; on the contrary, he was asked not to resign; and he gave himself *two months* within which to make up his mind. Obviously, his was a voluntary resignation.

4. *The Settlement Agreement.* The defendant also pleaded *accord and satisfaction*, alleging that the claim asserted by the plaintiff was in fact the claim of the firm of Chapman, Wolfsohn & Friedman, which had been settled by the surviving partners. In furtherance of this defense, defendant filed a Motion to bring them in as Third Party Defendants, and filed a Third Party Complaint, in which he demanded judgment against them for any amount which might be adjudged against him and in favor of the Plaintiff (R. 106). The Third Party Defendants consented to the Motion, the plaintiff opposed, (R. 108), but the Motion was granted.

The Settlement Agreement (R. 19) recited that under the partnership agreement of Chapman, Wolfsohn & Friedman any compensation for services rendered by any of the partners belonged to the partnership; also that it was the intention of the surviving partners to settle and extinguish all claims, rights and interests which the partnership, or the surviving partners and their wives had against or in PIMCO. The settlement was in the nature of a purchase by Hankin and his associate of all these claims, rights or interests.

Plaintiff's counsel questioned the right of the partners to enter into the settlement agreement (R. 28), and under oath and otherwise attributed to the defendant state-

ments he had never made (R. 24, 30), but Plaintiff never denied the facts recited in the agreement, including the fact that the claims asserted by the plaintiff were those of the firm of Chapman, Wolfsohn & Friedman which had been settled by the surviving partners.

5. *Decision of the District Court.* Neither in the pleadings nor in the affidavits, nor in the oral argument before District Judge Curran did the Plaintiff contradict or counter the legal defenses set forth in paragraphs 1(a), 1(b) and (2)(a) above, nor any of the facts relating to decedent's failure to perform his part of the agreement as set in par. 2(b) above, nor any of the facts or arguments relating to the alleged breach of contract, as set forth in par. 3(a), 3(b) 3(c) and 3(d) above, nor any of the facts relating to the Settlement Agreement. In other words, there was no genuine issue of law or fact. Accordingly, on May 7, 1962, the District Court entered an Order granting summary judgment in favor of the defendant and dismissed the Third Party Complaint as being moot.

6. *Motion for Reconsideration.* On June 11, 1962, plaintiff filed a Motion to Reconsider the Order of May 7, 1962 (R. 32-9), alleging "newly discovered evidence", notably an Exhibit comprising the Minutes of the Meeting of the PIMCO Executive Committee held on February 11, 1959 (R. 37-8). These minutes which contained a statement that Mr. Wolfsohn "insisted on resigning" were repeatedly displayed by the plaintiff as "evidence" that the decedent resigned involuntarily, that this was a continuation of the demand for $10,000 and that the defendant Hankin "practised deception upon the Court" (R. 34, See also R. 132). Defendant's position was that the Exhibit was neither "newly discovered" nor "evidence" of what was sought to be established, but only of Mr. Wolfsohn's voluntary resignation (R. 113).

On October 12, 1962, the District Court denied this Motion. (R. 171). On appeal, the Court of Appeals, in its opinion of May 29, 1963, held that there was no abuse of discretion[2], stating (321 Fed. 2d 393):

> "The motion under Rule 60(b) addresses itself to the sound discretion of that court, and, after studying the record as made, including the alleged newly discovered evidence, we find no abuse".

No further demonstration is needed to show that the Court of Appeals properly affirmed the judgment of the District Court.

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[2] Apart from the propostion that the Order of May 7, 1962 was correct, the following were good reasons for the denial of the Motion for Reconsideration:

(a) The minutes of February 11, 1959 were not "newly discovered", as was finally revealed by Mr. Simon himself (R 194). He had a copy of these minutes long before May 7, 1962; thereafter he obtained a "certified copy" of the minutes and presented that as "newly discovered evidence." Even if he did not have a copy of the minutes before May 7, 1962, he could have discovered it by the exercise of due diligence. He falsely described the minutes as a continuation of a demand for $10,000 (R 132), when it made no mention of any money, and as evidence of an involuntary resignation, when it was actually evidence of Mr. Wolfsohn's will to resign, despite requests to the contrary.

(b) Mr. Simon falsely represented that defendant Hankin obtained $72,000 with stock to which "plaintiff claimed ownership" (R 34), when there was no such claim nor any basis therefor.

(c) Mr. Simon violated Rule 5(a) F.R.C.P. by failing to serve full and true copies of his Exhibits to the Motion on the opposing side (R 115, 117, 124). To date Mr. Hankin has no copy of Exhibit 2, except for the excerpt included in the Record (38-9).

(d) Finally, all of the statements and arguments in the Motion were irrelevant and immaterial in that, assuming them to be true, they did not give rise to a contract for the breach of which action could be maintained against defendant Hankin, nor did they create a right of action in tort which could be said to have survived the decedent; nor did they establish performance of the contract by the decedent, nor did they support allegations as to breach of contract by the defendant.

D. Petitioner's Constitutional Questions are Without Substance.

Petitioner's counsel argues that the decision of the Court below violated Petitioner's rights to "due process" and to "trial by jury". The answer is that not every decision against Petitioner shakes the very foundation of our Government, and not every decision furnishes an occasion for Petitioner to take refuge in the Constitution of the United States.

1. *Due process.*—Mr. Simon argues that "the refusal of the Court of Appeals to comply with the mandate of the Supreme Court is a denial of due process" (Pet. p. 6; Mand. pp. 16-21). Not at all. Such refusal might violate some provision of the Judicial Code, but not the due process clause of the Constitution, especially when there is no constitutional right to any appeal. However, as has already been shown, there was no refusal to comply with this Court's mandate. To the contrary, there was full compliance therewith (p. 7 supra).

2. *Trial by jury.* Mr. Simon also argues that the courts below denied Petitioner's right to a trial by jury, contrary to the Seventh Amendment to the Constitution (Pet. p. 6; Mand. pp. 26-35). The question, however, is not whether Petitioner was entitled to a trial by jury, but whether she was entitled to *any* trial. If, as has been shown, Petitioner had no case as a matter of law, or there was no genuine issue of fact, she was not entitled to any trial. This is the very meaning of "summary judgment". The Seventh Amendment does not guarantee a trial by jury when there are no issues to be tried.

As to Mr. Simon's argument that he should be granted a jury trial on Respondent's counterclaim, the matter has been sufficiently covered in Respondent's Brief in Opposition to the Petition for Writ of Mandamus (pp. 6-8 therein) and deserves no further comment.

II. THE PETITION SHOULD BE DISMISSED FOR VIOLATION OF RULE 21.

1. *Requirements of Rule 21.*—Rule 21, para. 1, of the Rules of this Court requires that, together with a petition for writ of certiorari, the Petitioner shall file a certified transcript of the record in the case. Para. 3 of said Rule provides that, where the Court below permits the use of an "appendix record" on appeal, the requirements of Para. 1 shall be deemed satisfied, if the petitioner files a copy

> "of the appendices filed by *all the parties* below . . . . together with *all the proceedings* in the court below, the *whole* to be duly certified." (Emphasis supplied)

There is good reason for this Rule. The record in the District Court comprises the facts on appeal in the Court of Appeals. The records in both lower courts comprise the facts for review by this Court. Obviously, all the facts must be presented to this Court, not merely those which are to Petitioner's liking. In the absence of a stipulation limiting the record to those portions which all parties agree to be pertinent to the consideration of the case, the entire record must be made available. Furthermore, as an exception to Para. 1 of Rule 21, para. 3 must be strictly interpreted and applied.

2. *Practice adopted by Clerk of the Court below.* The Clerk of the U.S. Court of Appeals for the District of Columbia Circuit adopted a practice permitting each party to designate the portions of the record he wants to be certified to the Supreme Court and requiring each party to pay for the certification of his portion of the record. This is not a rule promulgated by the U.S. Court of Appeals for the District of Columbia Circuit, but a practice adopted and pursued by the Clerk of said Court, notwithstanding that such practice does not conform to the Rules of this Court.

Respondent respectfully submits that, as between the Rules of this Court and practices adopted by the Clerks of the Court of Appeals, the former must prevail. Proceedings in this Court would be chaotic, if the Clerk of each of the eleven Circuits were permitted to regulate the manner in which petitions or appeals in this Court should be filed. Respondent believes that this practice in the Court below can be corrected by an appropriate letter written by the Clerk of this Court, under the authority of the Court, to the Clerk to the United States Court of Appeals for the District of Columbia. This, however, would not cure the deficiency in the f ing of the Petition for Writ of Certiorari in this cas

3. *Facts Pertaining to the F ord herein.*—Instead of complying with the Rules of s Court, Petitioner followed the practice adopted by the Clerk of the Court below. Petitioner's counsel so designated the portions of the record which he wanted this Court to read, as to present an anomalous situation. The facts attending the Record in this case are as follows:

(a) When it came to filing an "appendix record" in the Court below, Petitioner's counsel, instead of complying with the rules of that Court, filed an appendix in which he included Plaintiff's initial pleadings in full, but only excerpts from the defendants' pleadings, so that the excerpts presented a distorted and insufficient defense. (Compare R. 14-19 with R. 84-106) He also included some of plaintiff's subsequent pleadings, or excerpts therefrom, without the responsive pleadings of the defendant. In some instances, because of the free use of omission marks, the excerpts made no sense (e.g. R. 45. Compare with R. 123-141). The appendix was designated by Mr. Simon as a "Joint Appendix", despite the fact that he included therein no portions of the record designated by Respondent. (R. 275-6).

(b) Respondent filed a motion to strike the so-called "Joint Appendix" (R. 1-52). There was considerable delay in the submission of said motion to the Court, and again in the Court's action thereon. In order to avoid being in default, Respondent filed a "Supplemental Joint Appendix" (R. 84-184), in which he included the defendants' pleadings in full, also the plaintiff's pleadings which had previously been excerpted and pleadings responsive to any pleadings filed by either party. True, when the "Supplemental Joint Appendix" was filed, it was rejected by the Acting Chief Deputy Clerk, as Mr. Simon stated (Mand. p. 31). In fact, since Respondent disagreed with the Deputy Clerk, the "Supplemental Joint Appendix" went back and forth several times. Finally, it was filed. To Mr. Simon it became a part of the record "through some peculiar manner". The "peculiar manner" was an Order of the Court (R. 291).

(c) Petitioner's counsel did not comply with Rule 21 (3) when he filed his first Petition for Writ of Certiorari (No. 680, October Term, 1963). Instead of filing the appendices of *all* the parties, he filed only his own "Joint Appendix". Instead of filing *all the proceedings* in the Court of Appeals, he filed only the opinion and judgment of the Court below and the denial of the Motion for Reconsideration. In order to avoid having the matter decided by this Court upon an incomplete record, Respondent filed certified copies of additional proceedings in the Court below, not included in Petitioner's filing (R. 185-299), as well as the Supplemental Joint Appendix (R. 84-184).

(d) The record upon remand filed by Petitoner's counsel with the present Petition for Writ of Certiorari again presents a one-sided case. It contains Appellant's Motion for Summary Reversal (R. 302) and Appellant's Answer to Appellee's Opposition (R. 312), but not the Opposition (R. 409), except Appendix II thereto (R. 321), which

by itself has no meaning in this case. Likewise, Appellant's Motion for Reconsideration is included (R. 317), but not the Statement in Opposition thereto (R. 418). Included are Appellant's (but not Appellee's) briefs before the Court of Appeals (R. 330-369), also various items of correspondence which are not part of the proceedings below. Other matters are included without corresponding answers or opposition, which could not possibly have a bearing on the dicision below, nor on any review thereof.

Mr. Simon thus treats the record as if it were a part of his argument, rather than base his argument upon the record made. This is hardly a valid approach. Even if the record were a part of his brief, it would not be permissible so to distort the facts, in order to present a one-sided case. Therefore, pursuant to Rule 21(6), Respondent filed certified copies of some court papers, other than those already before the Court, to which reference is made in the present brief (R. 409 et seq.).

(e) Nevertheless, there is no complete, orderly arranged, record before this Court Only those thoroughly familiar with all the details of the case can read the record with any sense of continuity. Added to this, Petitioner has appended to his Mandamus Petition (pp. 1A-87A) some papers, disjointed, with no connection between them, some complete and some excerpts, without any logical order, and he asks that this Appendix be considered as the record in this case (Pet. p. 4)!

In a case of this character, where the Court cannot rely on the statements of counsel, and there is no adequate record, the petition should be dismissed. An alternative solution would be to require that all proceeding in the Court of Appeal be filed and that the entire record (i.e. all the proceedings in the District Court and in the Court of Appeals) be printed in full, and in chronological order, under the supervision of the Clerk of this

Court, prior to ruling on the Petition for Writ of Certiorari, pursuant to Rule 21(7). Then the record could also be used in connection with the proceeding suggested by Respondent to discipline the attorney for the Petitioner (Brief in Opposition for Motion to File Petition for Writ of Mandamus pp. 15-16).

III. PETITION SHOULD BE STRICKEN FROM THE FILES OF THE COURT

It has already been shown in Respondent's Opposition to the Motion to File a Petiton for Writ of Mandamus which is incorporated in the present Petition that Mr. Simon characterized Respondent Hankin as a crook, a perjurer, a fraud, etc. He has repeated substantially the same charges in his "Reasons for Granting Certiorari" (Pet. pp. 5-9). The burden of Mr. Simon's argument is Respondent Hankin is a liar in all things (IN OMNIBUS), has "admittedly" effected a corrupt merger, has "automatically admitted" fraudulent concealment, has made another admission of fraud of monstrous import, has together with his son and nephew received $83,333 and has developed a corrupt and fraudulent record. Therefore judgment should be rendered in favor of Petitioner for breach of contract.

While Respondent Hankin does not deem it necessary or proper to defend himself against these scandalous charges, he thinks that something should be said about the charges of irregularity in the record, because they concern the Court itself.

Mr. Simon has been generally referring to the parts of the record filed by Respondent as fraudulent (e.g. R. 305, 307). He has also, however, leveled some specific charges of fraud:

1. In the Petition for Writ of Mandamus he states as follows (p. 34):

> "In this case, also, the Clerk of the Court of Appeals, has made careful certifications to indicate that certain frauds have been committed with the record by which Petitioner has been prejudiced and Respondent Hankin has prospered."

What these frauds are, does not appear. Mr. Simon gives no record references. An examination of the Clerk's certificate failed to disclose any frauds. Respondent therefore addressed an inquiry to the Clerk of the Court below (p. 24 infra), and the latter answered that there were no such certifications (p. 25 infra).

2. Now Mr. Simon can claim that Respondent Hankin is "fabricating" the record in this Court, just as he claimed that Hankin fabricated the record in the Court below when he attached the partnership agreement of the firm of Chapman, Wolfsohn & Friedman to his brief. (Mand. p. 30). He did so to settle the question whether Mr. Simon correctly insinuated that Hankin was guilty of a falsehood when he stated that under the partnership agreement any compensation earned by the partners belonged to the partnership. This was not done surreptitiously, as Mr. Simon states, nor was there anything immoral or improper to show that it was Mr. Simon, not Mr. Hankin, who was guilty of a falsehood.

3. Mr. Simon points to a "horrible corrupt irregularity" which crept into the record in this case (Mand. p. 31). He is referring to a pleading he had filed in the case of *Wolfsohn* v. *Chapman*, entitled "Answer and Exceptions of Plaintiff to Defendants' Objections to Interrogatories". There, Mr. Simon falsely stated that his Motion for Reconsideration in the case at bar had already been granted, and that the case was pending on a Rule to Show Cause as to why defendant should not be held in contempt of court (R. 149). In truth and in fact, his Motion for Reconsideration had not yet been considered. It was later denied, as was also his Motion for a Rule to Show Cause.

What was this "horrible corrupt irregularity"? Was it that Mr. Simon filed this false pleading in *Wolfsohn* v. *Chapman*? Or was it that Respondent Hankin made that pleading an Exhibit to his Request for Leave to File a Statement in Opposition out of Time, for the reasons stated therein (R. 146-149)?

Without going into all the scandalous matter contained in the petition, Respondent submits that it has been sufficiently demonstrated that the petition should be stricken from the files.

IV. RESPONDENT PRAYS FOR DAMAGES AND COSTS

It was evident from the beginning that there was no cause of action against Respondent Hankin either in contract or in tort. The prosecution was malicious, and the charges were viciously libellous. They were comparatively mild prior to the Order of the District Court granting summary judgment in favor of the defendants (R. 5, 10-11, 31). Since then, for more than two years after May 7, 1962, with each paper filed in court, and after each decision in the District Court or the Court of Appeals against Petitioner, the libellous abuses directed against Respondent have grown more and more violent. (The instances are too numerous for record references). All this was done by Mr. Simon as Petitioner's agent, for the obvious purpose, and with the effect, of delaying the effectiveness of the judgment of the District Court.

Respondent therefore invokes the power of this Court both under Rule 56(4) of the Rules of this Court and under its general equity powers, to adjudge reasonable compensatory and punitive damages against Petitioner and in favor of Respondent Hankin. Rule 56(4) of the Rules of this Court provides as follows:

> "Where a petition for writ of certiorari has been filed and there appears to be no ground for granting such a writ the Court may, in appropriate cases, adjudge to the Respondent reasonable damages for his delay."

Compensatory damages should be allowed for the money and time spent by Respondent Hankin in defending himself against these unwarranted attacks, and the sum of $25,000 would be very reasonable as punitive damages for the wilfully libellous and otherwise abusive statements.

As in his Brief in Opposition to the Petition for Writ of Mandamus (p. 15 therein) Respondent prays for further relief, by way of an Order enjoining Petitioner and her attorney, Mr. Simon, from further abusing, libelling and defaming the Respondent, and by way of issuing instructions that this petition for writ of certiorari should not be distributed among the depositories of the briefs and records of this Court.

CONCLUSION

Wherefore, Respondent prays that the Petition for Writ of Certiorari be denied or dismissed, and that it be stricken from the files of this Court. Petitioner further prays that he be awarded compensatory damages, and punitive damages in the sum of $25,000, and that the Court grant such further relief as it may deem just and proper in the premises.

Respectfully submitted

GREGORY HANKIN,
Attorney pro se,
3020 Tilden St. NW
Washington, D.C.

APPENDIX

September 23, 1964

Hon. Nathan J. Paulson, Clerk
U.S. Court of Appeals for the District
of Columbia Circuit,
Washington, 25, D.C.

In Re: Wolfsohn v. Bazelon, Chief Judge et al.
No. 493 Misc. U. S. S. C.

Dear Mr. Paulson:

In the Petition for Writ of Mandamus, in the above entitled matter (Wolfsohn v. Hankin et al. No. 17,449, U.S.C.A. D.C. Circuit), counsel for Petitoner states as follows (p. 34):

> "In this case, also, the Clerk of the Court of Appeals, has made careful certifications to indicate that certain frauds have been committed with the record by which petitioner has been prejudiced and respondent Hankin has prospered."

Since Petitioner's counsel has not indicated these certifications by any record references, could you please identify them, so that I may be able to meet this argument.

Thanking you for your attention in the matter,

Sincerely yours,

GREGORY HANKIN
Attorney pro se.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

Washington, 1, D.C.

Nathan J. Paulson
Clerk

September 28, 1964

No. 17,449—*Wolfsohn* v. *Hankin, et al.*

Gregory Hankin, Esquire,
3020 Tilden Street, N.W.
Washington, D.C. 20008

Re: Wolfsohn v. Bazelon, Chief Judge, et al.
No. 493, Misc. U.S.S.C.
(No. 17,449 U.S.C.A.)

Dear Mr. Hankin:

I have your letter of September 23, 1964, wherein you indicate that counsel for petitioner in the petition for writ of mandamus filed in the above entitled matter, has stated that the Clerk of this Court has made careful certifications to indicate that certain *frauds* have been committed with the record by which petitioner has been prejudiced and respondent has prospered. I know of no certifications by the Clerk of this Court indicating that *frauds* have been committed. The certifications of the Clerk in this matter are in the record with the Clerk of the Supreme Court.

Yours very truly.

NATHAN J. PAULSON
Clerk

/s/ Alexander L. Stevas
By: ALEXANDER L. STEVAS
Chief Deputy Clerk

ALS.jlk

CC: Fred I. Simon, Esq.
1010 Vermont Avenue, NW.
Washington, D.C. 20005